



Billing Code: 8025-01

SMALL BUSINESS ADMINISTRATION

13 CFR Chapter I

Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Policy Directives; Data Rights; Phase III Award Preference; Other Clarifying Amendments

RIN: 3245-AG64

AGENCY: Small Business Administration

ACTION: Advanced Notice of Policy Directive Amendments; request for comments

SUMMARY: The Small Business Administration (SBA) seeks comments from the public on two key areas of the SBIR and STTR Policy Directives that the SBA is considering revising: SBIR and STTR data rights, and the Government's responsibilities with respect to SBIR and STTR Phase III awards. The SBA intends to provide greater clarity and detail on these issues in the Policy Directives.

DATES: Comments must be received on or before INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.

ADDRESSES: You may submit comments, identified by RIN 3245-AG64, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: technology@sba.gov. Include RIN 3245-AG64 in the subject line of the message.
- Mail/ Hand Delivery/Courier: Edsel Brown, Office of Innovation, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Edsel Brown Jr., Assistant Director,
Office of Technology, Office of Innovation and Investment, (202) 205-6450 or at
technology@sba.gov.

SUPPLEMENTARY INFORMATION:

On August 6, 2012, SBA published a final SBIR Policy Directive at 77 FR 46806, and a final STTR Policy Directive at 77 Fed. Reg. 46855 (both available at www.sbir.gov), implementing the various provisions of the National Defense Authorization Act for Fiscal Year 2012 (Defense Authorization Act), Pub. L. 112-81, 125-Stat. 1298, related to the SBIR and STTR programs. These provisions were specifically enacted in Section 5001, Division E of the Defense Authorization Act, the SBIR/STTR Reauthorization Act of 2011 (Reauthorization Act), which amended the Small Business Act and made several amendments to the SBIR and STTR Programs. Subsequent to the publication of the SBIR and STTR final directives SBA issued clarifying amendments on January 8, 2014 at 79 FR 1303 (SBIR) and 79 FR 1309 (STTR).

In the notices of the final directives, SBA stated it intended to update the directives on a regular basis and to restructure and reorganize the directives, as well as address certain policy issues (e.g., those concerning data rights). At this time, SBA intends to revise the SBIR and STTR policy directives to provide greater clarification of SBIR and STTR data rights and the issues related to SBIR and STTR Phase III work. SBA intends this clarification to provide additional guidance to agencies regarding the implementation of the programs, additional policy language to inform regulatory texts in the Federal Acquisition Regulation and agency supplemental regulations, and useful information for SBIR/STTR awardee and applicant firms.

Although the SBIR and STTR Policy Directives are intended for use by the SBIR and STTR participating agencies, SBA believes that public input from all parties involved in the program would be invaluable. Therefore, before proceeding with proposed changes, SBA would like to know from the public if there are specific concerns that SBA should address when clarifying program policy in these identified areas.

1. SBIR/STTR Data Rights

The Small Business Act provides for SBIR and STTR awardees to receive certain data rights. See e.g. 15 U.S.C. 638(j)(1)(B)(v) (“retention of rights in data generated in the performance of the contract by the small business concern;”); id. at 638(j)(2)(A) and 638(p)(2)(B)(v) (“retention by a small business concern of the rights to data generated by the concern in the performance of an [SBIR or STTR] award for a period of not less than 4 years;”). SBA’s Policy Directives also explain that agencies must protect from disclosure and non-governmental use all SBIR/STTR technical data developed from work performed under an SBIR or STTR funding agreement for a period of not less than four years from delivery of the last deliverable under that agreement (either Phase I, Phase II, or Federally-funded SBIR/STTR Phase III) unless the agency obtains permission to disclose such SBIR or STTR technical data from the awardee or applicant. See SBIR and STTR Policy Directives, section 8(b)(2).

SBA has heard from small businesses that SBIR and STTR data has been disclosed to large contractors in procurement specifications, solicitations, or through reverse engineering. SBA has also received reports that Government contractors have been unaware that SBIR and STTR awards have special features with regard to data rights. SBA intends to address these issues by clarifying the language on data rights in the policy directives. SBA specifically requests comments on the following:

- The extent to which the awardee owns the data it generates in performance of an award.
- The Government's obligations to protect SBIR/STTR data from disclosure for at least four years following the delivery of the last deliverable of an SBIR/STTR award.
- During the protection period, the Government's right to access, review and evaluate SBIR/STTR data, but not to modify the data.
- After the protection period expires, the Government's right to use and disclose the data solely on behalf of the government, which means that the government may use and disclose data for competitive procurements (with non-disclosure agreements) but cannot use the data for commercial (non-governmental) purposes.
- Possible discrepancies between current FAR and agency supplemental regulations and SBA's SBIR/STTR Policy Directives.
- The feasibility and helpfulness of a short form data rights option (especially for grant agencies). Such a short form would be a simple agreement stating that the Government receives essentially no rights to SBIR/STTR technical data. The simplified data rights option would be for any agency or specific award.

2. SBIR/STTR Phase III Policy

The Small Business Act, as implemented by the SBIR and STTR Policy Directives at section 4(c), states that a Phase III award is one that derives from, extends, or completes efforts made under prior funding agreements under the SBIR program—

- in which commercial applications of SBIR-funded research or research and development are funded by non-Federal sources of capital or, for products or services intended for use by the Federal Government, by follow-on non-SBIR Federal funding awards; or

- for which awards from non-SBIR Federal funding sources are used for the continuation of research or research and development that has been competitively selected using peer review or merit-based selection procedures;

15 U.S.C. 638(e)(4)(C); see also, id. at 638(e)(6)(C).

If the government is interested in pursuing further work that was performed under an SBIR or STTR award, the government must, to the extent practicable, pursue that work with the SBIR or STTR awardee that performed the earlier work.

In the program's recent reauthorization legislation, Congress added the following language to the Small Business Act reinforcing the responsibility of the government to pursue such work with the awardee firm:

PHASE III AWARDS.—To the greatest extent practicable, Federal agencies and Federal prime contractors shall issue Phase III awards relating to technology, including sole source awards, to the SBIR and STTR award recipients that developed the technology.

Id. at 638(r)(4).

SBA is concerned that there is ambiguity or misunderstanding about how this policy governing Phase III awards should be implemented. Agencies and awardee firms may disagree as to whether new work qualifies as SBIR/STTR Phase III work. Additionally, even if there is agreement that the follow-on work is Phase III work, there may be disagreement as to how the agency is required to show preference to the SBIR/STTR awardee for the Phase III work.

One question that has been raised is whether preference for the Phase III work can be shown within a competitive solicitation. Another question is how such preference can or should be shown if the SBIR or STTR awardee would perform the Phase III work as a subcontractor to a prime federal contractor. Finally, there may be uncertainty about the steps that should be taken when applying the preference.

SBA intends to revise the language in the Policy Directives to clarify these issues, that is, the responsibility of agencies with regard to Phase III work and processes that can be used when determining the appropriate actions in Phase III cases. To help in the development of the revised policy guidance, SBA requests comments on the following:

- Whether SBA should define “to the greatest extent practicable” with respect to when agencies shall issue these Phase III awards; and if so, how the phrase should be defined.
- Whether, if the agency elects not to issue a Phase III sole source award to the SBIR or STTR Phase II awardee for follow-on Phase III work, there are other ways the agency could meet this statutory requirement.
- Whether an SBIR or STTR awardee can receive the required Phase III preference within a full and open competition.
- Whether the policy directive should outline the steps an agency must take in deciding or understanding when the Phase III preference applies.

Authority: 15 U.S.C. 638

Dated: September 15, 2014

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